

M. (No. 13)

v.

FAO

136th Session

Judgment No. 4693

THE ADMINISTRATIVE TRIBUNAL,

Considering the thirteenth complaint filed by Mr A. M. against the Food and Agriculture Organization of the United Nations (FAO) on 4 September 2020 and corrected on 16 October, the FAO's reply of 25 January 2021, the complainant's rejoinder of 20 April and the FAO's surrejoinder of 5 July 2021;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions;

Considering that the facts of the case may be summed up as follows:

The complainant challenges the decision of the Director-General dismissing as irreceivable his internal appeal against an "implied decision" by the Organization not to provide him with any Terms of Reference or work from 10 September 2016 until 31 December 2018, when he separated from service upon reaching the mandatory retirement age.

Facts relevant to this case are to be found in Judgments 4690, 4691 and 4692, also delivered in public this day, dealing with the first, second and third complaints filed by the complainant. Suffice it to recall that on 22 February 2017 the complainant was notified of the decision to transfer him from his position as Director of the FAO Liaison Office

for North America (LOW) to a Senior Policy Officer post in the FAO Regional Office for Europe (REU), based in Budapest, Hungary.

On 26 May 2017, the complainant wrote to the Assistant Director-General of REU, informing him that he had not yet received the Terms of Reference promised to him upon notice of transfer by email from the Director of the Office of Human Resources (OHR). The complainant suggested in the email that “in the absence of any Terms of Reference and benchmark, perhaps we can discuss possible priority areas of work in the REU region in which I could be engaged”. He received no response.

On 28 November 2018, the complainant submitted a letter of grievance to the Director-General against what he considered to be the implied decision not to provide him with any Terms of Reference or work since 10 September 2016. This grievance was rejected on 25 January 2019.

On 14 February 2019, the complainant lodged an appeal with the Appeals Committee. The Appeals Committee issued its report on 3 December 2019, and found that the fact that the complainant had received no Terms of Reference nor a response to his email of 26 May 2017 was tantamount to an implied decision on the part of the Organization, and that his appeal therefore fell within the scope of Staff Rule 301.1.311. The Committee also recommended that the Organization award an appropriate amount of moral damages for the injury to the complainant’s personal dignity resulting from the Organization’s negligence and breach of duty of care. The Director-General issued his final decision on 8 June 2020, dismissing the appeal in its entirety. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision. He seeks moral damages in the amount of 300,000 euros for injury suffered due to the FAO’s bad faith, violation of his terms of employment, violation of the FAO’s duty of care towards him, negligence towards his personal and profession reputation, and medical negligence. In addition, he seeks reimbursement of all legal fees, and interest on all amounts awarded at the rate of 5 per cent per annum.

The FAO asks the Tribunal to find the complaint irreceivable in its entirety, on the basis that the alleged failure to provide the complainant with Terms of Reference is the subject of other proceedings, as are many of the other matters raised by the complainant. Furthermore, it submits that the complainant's claim for excessive delay was filed outside the applicable time limit.

CONSIDERATIONS

1. The complainant was, at relevant times, a staff member of the FAO. This is his thirteenth complaint to the Tribunal. Some of the relevant background is found in judgments concerning earlier complaints (see Judgments 4690, 4691 and 4692).

2. On 28 November 2018, he wrote to the Director-General saying:

“In accordance with Staff Rule 303.1.311 I wish to appeal against your, and the Organization's, implied decision to not provide me with any terms of reference nor work for more than two years since 10 September 2016.”

At the time of this communication, the complainant held the post of Senior Policy Officer in the FAO Regional Office for Europe (REU), at the duty station Budapest, Hungary. He had been appointed to that post on 22 February 2017 and had taken up the position on 13 March 2017. He appealed internally against that appointment which culminated in a decision to dismiss his appeal. That dismissal led to a complaint in this Tribunal which is the subject of a judgment given this session (see Judgment 4690).

3. Staff Rule 303.1.311 provided:

“Staff members who wish to lodge an appeal regarding a grievance arising out of disciplinary action or arising out of an administrative decision which they allege to be in conflict, either in substance or in form, with the terms of their appointment or with any pertinent Staff Regulation, Staff Rule or administrative directive, shall state their case in a letter to the Director-General, through their head of department or office. The letter shall be despatched within 90 days from the date of receipt of the decision impugned. Staff members may request the Director-General to take a final decision on

their appeal in accordance with Staff Regulation 301.11.1. A reply from the Director-General shall constitute a final decision only if the appellant has received an express notification to that effect.”

This provision is part of a dispute or grievance settlement process. It confers a right to appeal to the Director-General about an adverse administrative decision which is analogous to a process of seeking the review of an administrative decision found in the rules of many international organisations. A condition precedent to exercising this right of appeal, is, relevantly, an anterior administrative decision.

4. On 25 January 2019, the complainant received a response to his appeal of 28 November 2018, rejecting the appeal. That letter did not address his claim that there had been an implied decision not to provide him with Terms of Reference. It did, however, address the contention that he had not been provided with work for two years. The letter included the factual assertion that “at no time during [the complainant’s] service in REU did [he] inform [his] managers that [he considered that he] had insufficient work or were lacking anything [he] required to carry out your duties”. On this basis, the letter rejected the proposition there had been an implied decision (at least about lack of work) and said that the appeal on the grounds of an implied decision did not fulfil the requirements of Staff Regulation 301.11.1 and accordingly, was irreceivable.

5. On 14 February 2019, the complainant lodged an appeal with the Appeals Committee. The Committee issued its report on 3 December 2019. In summary, it was satisfied there had been an implied decision certainly not to provide him with Terms of Reference and, more generally it seems, not to provide him with work. However, as to this latter point, the Appeals Committee couched its conclusions in terms of the Organization being negligent “in not providing [the complainant] with an adequate structure for his professional contribution of work in REU, for which he was clearly concerned, and thereby not caring for his dignity as an individual and a senior professional. It is evident that this situation caused [the complainant] some measure of distress and moral injury and that he rightly held certain expectations of the organisation.”

The Appeals Committee recommended that the “[O]rganization consider an appropriate amount of moral damages to be awarded to [the complainant] for the moral injury to his personal dignity that he suffered as a consequence of the Organisation’s negligence and breach of duty of care”.

6. The above conclusion was based, it appears, in substantial part on the failure of the Organization to respond to an email from the complainant of 26 May 2017. That email contained a lengthy, detailed, and seemingly thoughtful analysis by the complainant of work which might be done in the REU region. The complainant described this in the email as “possible priority areas of work in the REU region in which [he] could be engaged”. The Appeals Committee said that, in this respect, the failure to respond was “tantamount to an implied decision” and that “hence [...] his appeal falls within the scope of Staff Rule 301.1.311”.

7. On 8 June 2020, the Director-General gave a final decision on the appeal, dismissing it. This is the decision impugned in these proceedings. He concluded, in relation to the allegation there had been no provision of work, that the complainant “had not submitted any claim, or made any request to [his] managers, that could form the basis of an implied decision by the Organization to reject such a claim or request”. Moreover, the Director-General pointed out that the complainant had not done anything to indicate that he had elected to treat the lack of response to the May 2017 email as an implied decision and that his appeal was lodged 18 months after that email, which on any view was well outside the 90-day time limit for an appeal under Staff Rule 303.1.311.

8. In the usual case, the following reflects the case law concerning an implied decision. In Judgment 3089, consideration 7, the Tribunal said:

“An implied decision occurs only when a person who has submitted a claim is entitled to treat delay, inactivity, or some other failure, as constituting a decision to reject his or her claim and elects to do so.”

The concept of a claim involves the assertion of an unsatisfied right to a benefit or entitlement under the terms of appointment or the staff rules and regulations and its rejection entails the refusal to pay the benefit or grant the entitlement either in whole or in part. As this passage says, the refusal may arise by implication based on delay, inactivity or other failure. The Tribunal has accepted that a member of staff has a right to be provided with work (see Judgments 3937, 2360 and 630). In Judgment 3377, consideration 13, this was found to be harassment.

9. It is, in the Tribunal's opinion, too large a step to say that a failure to respond to an email, containing a heading "Confidential Note for Discussion", from the complainant identifying activities in which "[he] could be engaged", in the absence of Terms of Reference for the post, was an implied decision rejecting a claim that the complainant be provided with work. Indeed, part of the contents of the email of 26 May 2017 included the complainant identifying what he would be doing in the future. Moreover, the complainant does not identify any act or conduct of his that might reasonably be viewed as a claim to be provided with work. Even assuming that, in fact, he was not provided with work, that is insufficient to engage his right to appeal under Staff Rule 303.1.311 in the absence of an administrative decision to refuse to provide him with work whether that decision was express or implied. There was no express refusal. Insofar as there might have been an implied decision, the complainant appears to argue, by reference to Judgment 3089, that an implied decision would only arise when a complainant elected to treat delay, inactivity or some other failure as a rejection of a claim and that in fact there was no such election. But if this is correct, there was no implied administrative decision at all.

10. Two ancillary issues should be addressed. The complainant appears to argue that insofar as the Director-General's decision differed from that of the Appeals Committee, he failed to motivate his decision and explain why his approach and conclusions were different. The short answer is that he did, even if those reasons might not, from the complainant's perspective, be persuasive. The other matter is whether the complainant is entitled to moral damages for the delay in the internal

appeal. However, as has been the case in other proceedings by the complainant considered this session, the subject matter of his essential grievance concerning his treatment within the Organization required thoughtful consideration, as it was apparently received by the Appeals Committee. The length the appeal took was not disproportionate to the subject matter of the appeal and no moral damages should be awarded.

11. In the result, the impugned decision correctly rejected the complainant's claim, insofar as it related to the non-provision of work, as irreceivable. Accordingly, no occasion arose for the Director-General to consider the Appeals Committee's recommendation to award moral damages even though the impugned decision did address this question.

12. It follows that the complainant had not exhausted internal means of redress in relation to his claim that he had not been provided with work. Having regard to Article VII of the Tribunal's Statute, his complaint is, in this respect, irreceivable before the Tribunal.

13. To this point, the Tribunal has not addressed the specific claim that there had been an implied decision to reject his request for Terms of Reference for the post at REU. Whether there was or not is, in the circumstances of this case, irrelevant. That is because the failure to provide Terms of Reference was an issue raised in the complaint leading to Judgment 4690 referred to earlier and is addressed in that judgment. As the Organization rightly points out, a person cannot simultaneously submit the same matter for decision in more than one proceeding, citing Judgment 3291, consideration 6. Accordingly, in this respect, the complaint should also be dismissed.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 18 May 2023, Mr Michael F. Moore, President of the Tribunal, Ms Rosanna De Nictolis, Judge, and Ms Hongyu Shen, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 7 July 2023 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

ROSANNA DE NICTOLIS

HONGYU SHEN

DRAŽEN PETROVIĆ